Supreme Court, U.S.
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No. 98-1842

In The

Supreme Court of the United States

VENESSA S. PATTERSON and MATTHEW PATTERSON,

Petitioners,

versus

PREMIER BANK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Facts

Premier Bank, N.A. ("Premier" or "Respondent") employed Venessa Patterson ("Petitioner") as a bank teller at the Republic Tower branch in Baton Rouge. (Patterson depo. at 28-30).[1] Premier employed James Lopez as a utility teller, meaning he was rotated among the various branches as circumstances dictated. Lopez had no supervisory authority and had the same job title as Petitioner. (Rec. at 199). Prior to the events giving rise to this lawsuit, Lopez and Patterson had never met. (Patterson depo. at 96).

In May, 1994, Lopez was assigned for a single day to the Republic Tower branch. Lopez and Patterson worked the lobby window together without incident that day. (Patterson depo. at 96-103, 110).

Lopez was assigned again to the Republic Tower branch on June 16, 1994. He and Petitioner worked the drive-thru window together without incident from 9:00 a.m. until 2:00 p.m. The drive-thru window at the Republic Tower branch is located in a separate out-building that is physically removed from the main lobby. (Patterson depo. at 96, 155, 158).

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[1] Patterson's deposition was offered into evidence with Respondent's motion for summary judgment. It is contained in a separate folder apart from and has not been consecutively numbered with the rest of the record. Thus, Premier will cite directly to the transcript page number, rather than to a record page number.

Lopez's shift ended at 2:00 p.m., and shortly thereafter he returned to the main lobby. Patterson remained inside the drive-thru for the evening shift. During this time, two other tellers came to the drive-thru to help with the evening shift. (Patterson depo. at 163).

At approximately 3:30 p.m., Lopez momentarily returned to the drive-thru and picked up his cash-in and cash-out documents from the morning shift. Petitioner then asked Lopez: "James, wait a minute, what are you doing with those?" Lopez allegedly responded: "I'm going to ram them up your ___, and I'm quite sure they will fit." (Patterson claims Lopez did not say where he was going to ram the documents; in other words, he did not fill in the blank.) Patterson told Lopez not to talk to her like that and asked him what he had eaten for lunch. Lopez left without further comment. (Patterson depo. at 163-68).

Several minutes later, Petitioner walked over to the lobby and spoke with Lopez, but was unsatisfied with his response. (Rec. at 172-74). Patterson then returned to the drive-thru and finished the shift. She never saw Lopez again. (Patterson depo. at 189, 136).

The next morning, Friday, June 17, Patterson related the incident to Claude Platte, the branch manager, and Brenda Davis, the assistant branch manager. Platte allegedly asked whether Patterson might have done anything to upset Lopez or whether Lopez might have been joking. Platte also allegedly said he did not find Lopez's statement shocking. Platte did tell Patterson, however, that he would speak to Lopez's supervisor. (Patterson depo. at 204-13).

Within half an hour, Platte called Petitioner back into his office. He apologized for not being more sensitive during the first meeting and reassured Patterson he would talk to Lopez's supervisor. (Patterson depo. at 213-15).

Platte was out of the office the entire week of June 20-24.

On Monday, June 20, just two business days after the incident, Tommy Jones, Vice President of Branch Operations, and Diane Leblanc of Human Resources met with Lopez and reprimanded him in writing. (Rec. at 199-200, 204). Lopez wrote a statement in which he said that he had only been joking, that he would not have made the remark if he thought Patterson would become upset, and that he was extremely sorry. (Rec. at 199-200, 202-03).

Platte returned to the office on Monday, June 27. Petitioner alleges that Platte did not greet her that morning when she arrived and that he avoided her throughout the day. (Patterson depo. at 233-35, 239-40). Patterson claims that Platte continued to avoid her the next day, at which time she had an anxiety attack and left work. (Patterson depo. at 236-39, 241-42). As a result of her anxiety attack, Petitioner began collecting short-term disability benefits and workers compensation. (Patterson depo. at 307). She never returned to work for Respondent.

By letter dated August 5, 1994, Diane Leblanc informed Patterson that Premier had investigated her complaint and that Lopez had been counseled with respect to his behavior. The letter further stated that

Platte understood the seriousness of Patterson's complaint. (Rec. at 200, 208, 270-71).

When Petitioner still had not returned to work *after six months*, she was told that her disability benefits would expire on December 28, 1994. Petitioner was further informed that she must return to work by that date or that her employment would be terminated in accordance with bank policy. (Rec. at 205, 207, 271-73).

Petitioner never returned to work, and Premier terminated her employment in accordance with bank policy effective December 28, 1994. (Patterson depo. at 272-74).

Other than Patterson's complaint, Respondent never received any complaint of inappropriate conduct of any sort by Lopez from any employee or customer. (Rec. at 200).

B. Procedural History

Petitioners filed this lawsuit in a Louisiana state court in Baton Rouge in April, 1995. Named as defendants were Respondent, Claude Platte, and James Lopez. The Pattersons originally asserted state law claims only for sexual discrimination and hostile work environment. (Rec. at 289).

On November 20, 1995, the Pattersons amended their state court petition to add a claim for hostile work environment under 42 U.S.C. § 2000e. (Rec. at 328). Premier timely removed the lawsuit to the United States District Court for the Middle District of Louisiana on December 5, 1995. (Rec. at 285).

On April 7, 1998, the district court granted a motion for summary judgment filed by Premier as to all claims. (Rec. at 68-79). The district court ruled that as a matter of law, the alleged discriminatory conduct was not actionable under Title VII or Louisiana law. (Rec. at 76-78). The court also ruled there was no genuine issue of fact that Respondent took prompt remedial action to deter any possible future discrimination. (Rec. at 76-77). Final judgment was signed and filed in the record on April 7, 1998. (Rec. at 67).[2]

The United States Court of Appeals for the Fifth Circuit affirmed the decision per curiam on February 12, 1999.

SUMMARY OF ARGUMENT

As a matter of law, Petitioners' claim of hostile work environment fails because they cannot establish two necessary elements: (1) the behavior to which Patterson was allegedly exposed was neither pervasive nor severe, and (2) Respondent took prompt remedial action to prevent any future harassment.

ARGUMENT

Petitioners argue that summary judgment is inappropriate because there exist genuine issues of material

[2] Both Lopez and Platte are now deceased. They were dismissed as defendants under Rule 25(a) of the Federal Rules of Civil Procedure on July 14, 1997.

fact respecting the individual elements of their Title VII claim.

To state a claim for relief under Title VII for a hostile work environment created by a non-supervisory co-employee, Patterson must prove that: (1) she belongs to a protected class, (2) she was subjected to unwelcome harassment, (3) the harassment was based on sex, (4) the harassment was so pervasive or severe that it affected a term, condition, or privilege of her employment, and (5) Respondent knew or should have known about the harassment and failed to take prompt remedial action. *See, e.g., Long v. Eastfield College*, 88 F.3d 300, 309 (5th Cir. 1996).

Considering the evidence in a light most favorable to Petitioners, as a matter of law they cannot prove two necessary elements of their claim for hostile work environment. First, whatever behavior Patterson experienced was neither pervasive nor severe. Second, Respondent took prompt remedial action upon learning of the alleged harassment.

A. Whatever Harassment Petitioner Experienced Was Neither Pervasive Nor Severe

The following undisputed factual allegations form the basis of Petitioner's claim that she was subjected to a hostile work environment: (1) Lopez's single comment to her in the drive-thru building on June 16, 1994, and (2) Platte's alleged insensitivity during his first meeting with Patterson on June 17 and his alleged avoidance of her on June 27-28. As a matter of law, this conduct was neither

pervasive nor severe, did not alter the conditions of Patterson's employment, and did not create a continuing abusive work environment.

Lopez's June 16 comment to Petitioner is not actionable sexual harassment for two reasons. First, the comment is gender-neutral. In *Gross v. Burggraf Construction Co.*, 53 F.3d 1531 (10th Cir. 1995), the defendant said to the appellant "what the hell are you doing? Get your ass back in the truck and don't you get out of it until I tell you." The Tenth Circuit noted that the term "ass", although vulgar, refers to a portion of the anatomy of persons of both sexes. Therefore, the court held that the term is gender-neutral and that its usage does not demonstrate gender discrimination. *Id.* at 1543. Lopez's statement – "I'm going to ram them up your ___" – is both gender-neutral *and* less offensive than the statement in *Gross*.

Lopez's comment is also not actionable because the mere utterance of an epithet which engenders offensive feelings is insufficient to support Title VII liability. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). Although the use of gender-neutral but profane or vulgar language may create an actionable hostile working environment, it must involve much worse language and be much more pervasive than what Patterson describes. For instance, in *Luttjohann v. Goodyear Tire & Rubber Co.*, 927 F. Supp. 403 (D. Kan. 1996), the plaintiff was subjected to crude but gender-neutral profanities on a daily basis for almost two years. The court said: "[T]he issue becomes whether the alleged daily profane, albeit gender-neutral, yelling is sufficient to state a hostile work environment claim. We believe the

answer is 'yes' as long as there is proof that the profane ranting occurred because of an employee's gender." *Id.* at 406. Similarly, in *Gross*, the court said the plaintiff must show she was subjected to a "steady barrage of opprobrious sexual comments." *Gross*, 53 F.3d at 1542. In the present case, there is neither "daily ranting" nor a "steady barrage"; instead, there is a single gender-neutral comment. By any objective standard, this mere utterance is insufficient as a matter of law to create Title VII liability.

Likewise, Platte's alleged insensitivity on June 17 during his first meeting with Petitioner is not actionable under Title VII. Although Platte may not have demonstrated ideal management technique, his conduct was certainly not sexual harassment or part of a hostile work environment. Furthermore, within a half hour of the first meeting, Platte called Patterson back into his office and reassured her that he took her complaint seriously and would talk to Lopez's supervisor. More significantly, Platte made sure that Patterson's complaints actually were addressed: Lopez was reprimanded just two business days later by Tommy Jones, Vice President of Branch Operations. It is clear as a matter of law that Platte's alleged insensitivity does not rise to the level of sexual harassment.

Finally, Petitioner claims Platte ignored and avoided her when he returned to the office on June 27 and 28. Once again, as a matter of law this is not actionable conduct under Title VII. In *Callendar v. Ergon, Inc.*, 928 F. Supp. 665 (S.D. Miss. 1996), the plaintiff complained to a company executive that her boss was harassing her. At trial, she testified that after complaining to the executive,

her boss retaliated against her by not speaking to her and by ignoring her. In response, the court said: "It would be unreasonable for this Court to believe that situations such as this would not create any animosity. . . . This Court cannot create a perfect world within a work environment *nor can we require employers to do the same.*" *Id.* at 668 (emphasis added). In other words, temporarily accepting Petitioner's allegation as true, Platte's conduct is insufficient as a matter of law to invoke the protection of Title VII. Finally, it bears reemphasizing that Platte did not ignore Patterson on Friday, June 17; that Platte was away from the branch the week of June 20-24; and that Patterson suffered her anxiety attack around mid-day on Tuesday, June 28. Platte allegedly ignored Patterson for only one and one-half days!

B. Respondent Took Prompt Remedial Action

Lopez and Patterson had the same job title, and Lopez had no managerial or supervisory authority over Patterson. (Rec. at 199). Therefore, Respondent can only be liable for Lopez's conduct if it knew or should have known of the harassment and failed to take prompt remedial action. *Nash v. Electrospace System, Inc.*, 9 F.3d 401 (5th Cir. 1993).

On Friday, June 17, the day after the incident, Petitioner told Platte of Lopez's alleged statement. On Monday, June 20, 1994, just two business days after the fact, Tommy Jones, Vice President of Branch Operations, and Diane Leblanc of Human Resources met with Lopez. Jones and Leblanc reprimanded Lopez in writing and explained to him that what he had done was wrong and

had upset Patterson. (Rec. at 199-200, 204). Lopez signed a handwritten statement in which he said that he had only been joking, that he would not have made the remark if he thought Patterson would become upset, and that he was extremely sorry. (Rec. at 202-03).

Respondent's response to Patterson's complaint was immediate and entirely appropriate. A reprimand as punishment for a single inappropriate remark is unquestionably reasonable. "Title VII does not require that an employer use the most serious sanction available to punish an offender, particularly where, as here this was the first documented offense by the individual employee." *Waymire v. Harris County, Texas*, 86 F.3d 424, 429 (5th Cir. 1996).

In her petition, Patterson states that Respondent's written reprimand of Lopez was "callous" and "a slap on the wrist." (Pet. at 10). These characterizations are simply wrong. Lopez gave a written statement in which he said that he had only been joking, that he would not have made the remark if he thought Patterson would become upset, and that he was extremely sorry. (Rec. at 202-03). A Vice President reprimanded Lopez in writing and told him that any additional complaints would be grounds for further disciplinary action, up to and including termination. (Rec. at 204). Respondent never received any other complaints regarding Lopez's conduct, either prior to or after June 16, 1994. (Rec. at 200).

Patterson also states that the reprimand was "insufficient action to ensure that the harassment would cease." (Pet. at 10). This is a remarkable assertion indeed, since Petitioner herself testified that *she never again saw or had*

any contact with Lopez. (Patterson depo. at 189, 136). Premier's response was more than reasonably calculated to end the harassment.

C. Petitioners' Other Allegations

Patterson did not return to work for six months after she suffered her alleged anxiety attack on June 28. On December 14, 1994, Respondent informed Patterson that her short-term disability benefits were about to expire, and that if she did not return to work, her employment would be terminated in accordance with bank policy. (Rec. at 205, 207, 271-73).

In response, *six months after the fact,* Petitioner called Diane Leblanc and changed her story about what happened. (Patterson depo. at 262-65). Patterson suddenly claimed that on the morning of June 16, shortly after she arrived at the Republic Tower branch, Lopez came up behind her and pinched her with both hands on each side of her waist. (Patterson depo. at 142-43, 146-50). Patterson also suddenly claimed that on the afternoon of June 16, when she confronted Lopez about the alleged remark, he responded with an unwanted hug. (Patterson depo. at 173-74, 180-81).

Petitioner told no one at the bank about these additional problems until she received the December 14 letter informing her of the potential lapse of her benefits and termination of her employment. Because she did not report these allegations until threatened with the termination of her employment, the veracity of these allegations must be questioned. Respondent contends that her uncorroborated self-serving testimony regarding events

not reported to the bank for six months is insufficient to create a genuine issue of fact.

Nevertheless, for purposes of this petition only, Premier accepts these eleventh-hour allegations as true. Petitioner described the alleged pinching incident as follows:

> Q: [I]t appears as though he came up behind you and just in a matter of a second pinched you and his hands were removed, is that a fair way to say it?
>
> A: Yes.
>
> Q: And is it also fair to say he didn't grab a big part of your skin or grab your waist, but it was a pinch with his fingers?
>
> A: It wasn't a grab, but it was an unwarranted touch from a man, a male.
>
> Q: Right now I'm not asking you about whether –
>
> A: It was soft. It was like a gentle little pinch.

(Patterson depo. at 147-48).

Patterson described the alleged hugging incident as follows:

> Q: And then he came behind you and put his arms behind you, its that correct?
>
> A: He put his arms around me, like, as if we were hugging from behind, but from behind. His arms came from behind me and I pushed his arms away and I told him I need to see him in the kitchen.

> Q: So a fair way to describe what happened is he came up behind you and put his arms around you as if to hug you?
>
> A: Yeah, a hug.

(Patterson depo. at 180). Patterson also said that when Lopez allegedly hugged her, he did not try to pinch or squeeze her or do anything else. (Patterson depo. at 123).

As described by Petitioner, these incidents are not actionable under Title VII. A claim of hostile work environment requires "*extremely* insensitive conduct against women, conduct *so egregious* as to alter the conditions of employment and destroy their equal opportunity in the workplace." *DeAngelis v. El Paso Municipal Police Officers Association*, 51 F.3d 591, 593 (5th Cir.), *cert. denied*, 516 U.S. 974, 116 S. Ct. 473, 133 L. Ed. 2d 403 (1995) (emphasis added). Judged by this standard, these incidents are not the kind of extreme and egregious conduct that destroyed Patterson's equal opportunity with Respondent.

Nor can Petitioners argue that Respondent should have taken additional remedial action when the bank learned six months later of the alleged touching incidents. An employer cannot take prompt remedial action unless it is promptly notified of the offending conduct. For example, in *Hartleip v. McNeilab, Inc.*, 83 F.3d 767 (6th Cir. 1996), the plaintiff told no one of her complaints until long after the conduct had ceased and she had terminated her employment. The Sixth Circuit said: "Because [the plaintiff] did not tell [her district manager] about the harassment until months after the conduct had already ceased – and after she had already resigned – she did not provide [her employer] with the opportunity to take

remedial action." *Id.* at 777. Similarly, Petitioner told no one about the alleged touching incidents for six months, during which time she remained absent from work collecting disability benefits and workers compensation. Lopez never returned to the Republic Tower branch and never had another complaint of inappropriate conduct lodged against him. (Rec. at 200).

D. Other Cases

Federal courts have entered judgment in favor of defendants in sexual harassment cases involving much more severe conduct than is involved in this case. For example, in *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987), the offending co-worker put his hands on the plaintiff's hips, dropped his pants in front of the plaintiff and others while waiting to board an airplane, touched the plaintiff's breasts, and "playfully" choked the plaintiff when she complained about the man's conduct. The offending conduct occurred over two days. The Fifth Circuit, affirming the trial court's judgment against the plaintiff, said:

> [A]lthough we do not condone [the man's] conduct, it was not as aggressive or coercive as that underlying a number of hostile sexual environment claims that have been unsuccessful in court. [The plaintiff] was not propositioned, she was not forced to respond to [her co-worker], she was not placed in any threatening situation.

Dornhecker, 828 F.2d at 309.

In *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986), a mechanic in an automotive department repeatedly propositioned the plaintiff and suggested the plaintiff give him a rub-down. Another mechanic speculated to the plaintiff about her sexual habits, and still another slapped her on the buttocks. The Seventh Circuit, affirming the trial court's granting of summary judgment against the plaintiff, said: "Concerning the conduct of other mechanics, there is no indication that any offensive conduct on their part was repeated or relentless." *Scott*, 798 F.2d at 212.

THERE ARE NO COMPELLING REASONS TO GRANT THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States says that a petition for a writ of certiorari is only granted for compelling reasons. Furthermore, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioner summarized her writ application as follows:

> In sum, the allegations of petitioners illustrate that there are genuine issues of material fact. The Fifth Circuit clearly erred in affirmed [sic] the district court's determination that summary judgment was warranted under the facts presented.

(Pet. at 10).

Certainly, there are no compelling reasons for granting Patterson's petition. She simply complains that the lower courts made erroneous factual findings and misapplied the law. The petition should be denied.

CONCLUSION

Respondent respectfully suggests that this case falls so far short of what Title VII requires as to be frivolous. As a matter of law, the evidence, viewed in a light most favorable to Petitioners, does not establish the severe, pervasive, hostile, aggressive, coercive, or abusive conduct required to maintain a claim for hostile work environment:

> A claim for a sexually hostile working environment . . . embodies a series of criteria that express extremely insensitive conduct against women, conduct so egregious as to alter the conditions of employment and destroy their equal opportunity in the workplace. Any lesser standard of liability, couched in terms of conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality.

DeAngelis v. El Paso Municipal Police Officers Association, 51 F.3d 591, 593 (5th Cir.), *cert. denied*, 516 U.S. 974, 116 S. Ct. 473, 133 L. Ed. 2d 403 (1995).

Respondent is entitled to judgment as a matter of law and respectfully requests that this Honorable Court deny the petition for writ of certiorari.

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